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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 13

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES A. WHITE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

## BRIEF FOR JAMES A. WHITE IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

## BRIEF FOR JAMES A. WHITE IN OPPOSITION.

## OPINIONS BELOW.

The Opinion of the Court of Appeals (Pet. App. A, pp. 7-15[1] and its opinion on rehearing *en banc* (Pet. App. B, pp. 16-41) are not yet reported.

[1] "Pet. App." references are to the Appendix, attached to the government's petition for writ of certiorari.

## JURISDICTION.

The judgment of the panel of the Court of Appeals was entered on March 18, 1968. The government's petition for rehearing *en banc* was granted, and the *en banc* judgment of the Court of Appeals (Pet. App. C, p. 42) was rendered on January 7, 1969. Respondent denies that this Court has jurisdiction to review the judgment rendered by the Court of Appeals on January 7, 1969 for reasons set forth in his Argument, *infra*.

## QUESTIONS PRESENTED.

1. Whether respondent's Fourth Amendment rights, protecting him against governmental intrusion by unreasonable search and seizure, were infringed when government narcotic agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws.

2. When the government seeks to rely upon consent of one party to a conversation to justify the lawfulness of an electronic search, does the government sustain its burden of proving that the alleged consent was freely and voluntarily given by merely showing that the person was "cognizant" of the eavesdropping?

3. Does the spirit of federal protection against double jeopardy preclude government petitioning of Federal Appellate Court for rehearing *en banc* of panel decision reversing defendant's conviction, especially where the rules of the Court of Appeals do not specifically provide for such a rehearing?

## STATEMENT.

The government's statement in its petition for writ of certiorari is clearly erroneous. The government states that the informant **consented** to the government's illegal electronic eavesdropping (Pet. 3).[2] Such contention is not supported by the record or by the Court of Appeal's decisions. For that reason, respondent herein sets forth portions of the Court of Appeal's opinion first rendered in this case which summarizes the facts as follows:

> "Defendant [respondent] was convicted of the possession and sale of narcotics largely as a result of the testimony of federal narcotics agents that they heard defendant make self-incriminating statements, which had been transmitted over the air by an electronic device hidden under the informer's clothes. Thereby, the agents heard conversations taking place in the defendant's home, his car, his place of business, as well as in the informer's house and car. The evidence clearly shows that by these means government agents were able to, and did, testify to what they thus heard, including admissions by defendant. **Informer Jackson did not testify at the trial.** There is no contention that the government relied on any warrant or Court Order" (Pet. App. A, pp. 11-12. Emphasis added).

A panel of the Court of Appeals reversed the conviction, applying the principles announced by this Court in **Katz v. United States,** 389 U. S. 347, and held that the Federal Agents were required to obtain a search warrant before

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[2] The government's attempt to supplement the record by trying to leave the impression with this Court that the informer gave his consent to the government to electronically eavesdrop is evidenced by the fact that said contention is made by the government at least twice on page two of its petition ("Questions Presented"), three times on page three, once on page four, and once on page five.

using electronic means to overhear respondent's conversations with the secret informant. The panel of the Court of Appeals did not remand the case for a new trial (Pet. App. A, pp. 14-15). Also, nowhere in the majority opinion by the panel of the Court of Appeals does it state that the secret informant consented to the government's illegal electronic eavesdropping.

The government filed a petition for rehearing *en banc* in the Court of Appeals, however, the government did not specifically argue that the Court of Appeals erred in its statement of the pertinent facts in the case. Respondent's reply brief that was filed in the Court of Appeals brought to the Court's attention that the government did attempt to supplement the record by trying to leave the impression with the Court that the secret informer gave his consent to the government to electronically eavesdrop on the illegally overheard conversations. Respondent stated at page 3 of his reply brief as follows:

> "Indeed, the government cites no page references to the record showing that the informant 'consented' to having the Kel set placed upon his person. Contrariwise, the government gives three citations to the record where government agents concluded that the informant gave them 'permission' to listen to one telephone conversation. Further, during oral argument before this Court, government counsel begrudgingly admitted that the record did not support a contention that the informant 'consented' to having the Kel set placed upon his person."

Respondent in his reply brief also brought to the Court of Appeal's attention the fact that the trial Court unreasonably limited the cross-examination by defense counsel of government agents concerning the government's relationship with the secret informant. This particular issue was raised in respondent's original brief in the Court of

Appeals, but the Court of Appeals found it unnecessary to consider said issue.

The Court of Appeals *en banc* held that the conviction must be reversed, but remanded the case for new trial (Pet. App. B, p. 32). The Court of Appeals did not hold that the secret informant consented to the government's illegal eavesdropping, but held that "one party to the monitored conversation, informer Jackson, was cognizant of the Government's eavesdropping activities" (Pet. App. B, p. 23). The Court of Appeals held that consent was without decisional significance and that a third person could not waive a speaker's (respondent's) Fourth Amendment rights. Thus, the Court below made no determination regarding whether the informant consented. The Court stated:

> "In holding that the rationale of **Katz** applies regardless of whether one party to a private conversation consents to the Government's interception of the conversation, we do not purport to make any determination regarding the voluntariness of informer Jackson's participation in the agents' scheme. Since it is our view that a listener's consent is irrelevant, it is difficult to see how informer Jackson's conduct, whether the product of coercion or consent, could have constituted a waiver of the defendant's constitutional rights. Only his own consent could have created such a waiver. The rationale of **Katz** permits no other conclusion" (Pet. App. D, p. 24).

## ARGUMENT.

**1. The record below and the Court of Appeal's opinion does not support the government's contention that the informant consented to the illegal eavesdropping.**

The thrust of the government's petition for certiorari, including its "Questions Presented" relies upon a false premise, to-wit: that the informant **consented** to the government's illegal electronic eavesdropping. As shown in respondent's Statement, *supra,* the record in this case does not confirm the government's contention that the informant consented to anything. Not only does the government fail to cite in its petition one page reference to the record supporting its contention, but the Court below never held that consent was given. The opinion of the Court of Appeals sitting *en banc* merely states that the informant was "cognizant" of the eavesdropping (Pet. App. B, p. 23). The Court below did not make a determination regarding the voluntariness of the informant's participation in the government agent's scheme to illegally eavesdrop upon respondent's private conversations.

Thus, assuming *arguendo* that "consent" is material to the issues in this case, the record does not support the government's contention that the informant did consent to the illegal search. Further, the government had the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. **Bumper v. State of North Carolina,** 88 S. Ct. 1788. In **Bumper,** this Court held:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." **Bumper v. State of North Carolina,** 88 S. Ct. 1788, 1792.

Clearly, the mere knowledge by the informant that a radio device was attached to his person does not sustain the government's burden of proving voluntary consent. "Consent, as a matter of law, means more than a willingness to cooperate or a formal document expressing consent." **United States v. Jones**, D. C., 292 F. Supp. 1001, 1008.[3]

Certiorari should be denied in this case for the reason that the questions presented by the government rely upon facts and circumstances that are not present here, to-wit: voluntary consent by one of the parties to the illegally overheard conversations.

Additionally, there is no conflict between the opinion in this case and the decisions of the Second and Fifth Circuits cited by the government (Pet. pp. 3-4). As stated by the government, those cases hold that **Katz v. United States**, 389 U. S. 347, "does not apply to situations where one party has consented to have his conversation electronically monitored" (Pet. p. 3). Here, the government did not prove consent, therefore all the cases cited by the government are inapplicable and are not in conflict with the instant opinion. Further, the informants testified in the cases relied upon by the government. See, **United States v. Kaufer**, 4 Cr. L. Rep. 2333 (No. 32692, C. A. 2, decided Jan. 14, 1969); **Fountain v. United States**, 384 F. 2d 624 (C. A. 5); **Handsford v. United States**, 390 F. 2d 373 (C. A. 5); **United States v. Leighton**, 386 F. 2d 822 (C. A. 2); **United States v. Jackson**, 390 F. 2d 317 (C. A. 2); **Long v. United States**, 387 F. 2d 377 (C. A. 5).

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[3] In **Jones**, the informant did sign a written consent to the monitoring and the government advised the trial Court of its intention to use the intercepted conversations merely as corroboration of the informant's testimony. The Court suppressed the recordings. The Court relied upon this Court's opinion in **Katz v. United States**, 389 U. S. 347 and the Seventh Circuit Court of Appeal's first decision in the instant case.

Thus, the government cites no case which is in conflict with the decision in this case.

2. **Respondent's Fourth Amendment rights were infringed when government agents electronically and surreptitiously intercepted his private conversations without prior judicial approval and in violation of State criminal laws**

Assuming *arguendo* that the record in this case establishes that the informant did, in fact, freely and voluntarily consent to the unlawful eavesdropping, respondent submits that this Court should deny certiorari for the reason that it has previously held that "consent" by an informant is not controlling in this type of case. In **Osborn v. United States,** 385 U. S. 323, the informant **consented** to the use of the electronic device, but this Court held that the "indiscriminate use of such devices in law enforcement raises grave Constitutional questions under the Fourth and Fifth Amendments . . ." 385 U. S. at 329. The **Osborn** decision has been quoted and cited with approval in **Berger v. State of New York,** 388 U. S. 41, 57, and in **Katz v. United States,** 389 U. S. 347, 355. Nowhere in the **Osborn, Berger** or **Katz** cases did this Court conclude that "consent" was material or determinative of the issues raised therein.

As stated in the opinion below, "the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in **Katz**" (Pet. App. B, pp. 23-24). The electronic eavesdropping in **Katz** and in this case were both part of a "bugging" technique by which the conversations were transmitted to an "uninvited ear", to-wit, government narcotics agents. The critical and determinative factor in both cases was that the respective speakers did not consent to the overhearing of their state-

ments and same were unlawfully overheard by third persons (government agents), uninvited by the speaker.

The government, citing the following sentence from the opinion in **Katz** attempts to distinguish **Katz** from the facts in this case. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 399 U. S. 351. However, the government fails to quote the next sentence in the **Katz** opinion which states: "**But what he seeks to preserve as private,** even in an area accessible to the public, may be constitutionally protected" (389 U. S. at 351, emphasis added). Here, the record clearly shows and the Court below specifically found, that the **respondent justifiably expected his conversations to be private** (Pet. App. B, p. 28). The Court below also found that the government agents recognized that the respondent sought to exclude their uninvited ears.

The government's interpretation of **Katz, Hoffa v. United States,** 385 U. S. 293, and **Lewis v. United States,** 385 U. S. 206, is that whenever a person speaks to a third person (even in one's own home), that third person can legally waive the speaker's Fourth Amendment rights and surreptitiously broadcast his words to the world. Thus, the government will deny a speaker's (unless he talks to himself) Fourth Amendment rights if a third person wants to surreptitiously waive his rights for him. The government claims that this waiver by a third party should be allowed without any judicial safeguards.

The decisions in **Lewis** and **Hoffa** are inopposite for those cases presented situations where there was no electronic interception or transmission of the defendant's words. Those cases merely hold that an informant is a competent witness to conversations and dealings with a defendant. Of course here, the informant never testified, but the goverment did electronically intercept and transmit the defendant's private conversations.

The decision below does not suggest that this Court's decision in **Katz** overruled **Lopez v. United States**, 373 U. S. 427. The facts in **Lopez** are distinguishable to the facts here. First, **Lopez** concerned the attempted bribery of a government agent, **known** to the defendant to be a government agent. Second, the same government agent who recorded defendant's conversation testified at trial. Here, the secret informer never testified. Third, in **Lopez** there was no transmission over the air of defendant's voice (only a recorder worked properly). Here, defendant's voice was transmitted over the air to be heard not only by government agents, but by anyone else who happened to be tuned in on that specified radio frequency.

The Fourth Amendment commands that there be a warrant, issued upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. There was no warrant in the instant case. As in the **Katz** case,

> "The government agents here ignored 'the procedure of an antecedent justification . . . that is central to the Fourth Amendment' [citing **Osborn**, 385 U. S. 323, 330]; a procedure that **we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case.**" **Katz v. United States**, 389 U. S. at 359 (emphasis added).

See also **Weeks v. United States**, 232 U. S. 383; **Agnello v. United States**, 269 U. S. 20; **United States v. Jeffers**, 342 U. S. 48; **United States v. Lefkowitz**, 285 U. S. 452; **Aguilar v. State of Texas**, 378 U. S. 108.

Additionally, the law is clear that the government has the burden of proving that its warrantless searches were conducted under exceptional circumstances and must show the need for the searches outside judicial process without prior approval by judge or magistrate before the government can validly claim an exemption. **Wong Sun**

**v. United States**, 371 U. S. 471; **United States v. Jeffers**, 342 U. S. 48, 51; **United States v. Rivera**, 321 F. 2d 704 (C. A. 2). Here, the government did not sustain its burden of proving that its warrantless search comes within the few exceptions set forth in **Katz**. Thus, there is no good reason for granting certiorari in this case.

In **Katz**, the government urged that because its agents relied on the decisions in **Olmstead v. United States**, 277 U. S. 438 and **Goldman v. United States**, 316 U. S. 129, which had been the law at the time of their acts, this Court should retroactively validate their conduct. That, this Court refused to do, even though the agents acted with restraint. 389 U. S. at 356. The government was bound by this Court's application of Fourth Amendment principles.

Similarly here, the government urges, in effect, that its agents must be judged by pre-**Katz** standards and that this Court similarly retroactively validate its conduct. This rationale should not be adopted here for the same reasons given by this Court in the **Katz** case.

Furthermore, the respondent emphatically states that even under those prior standards, the conviction below, as analyzed by the Court of Appeals, would necessarily have been reversed. The Court of Appeals' opinion conclusively establishes the invalidity of the questioned searches and seizures under Supreme Court cases decided prior to **Katz**. **Berger v. New York**, 388 U. S. 41; **Osborn v. United States**, 385 U. S. 323. In this regard, it should be noted that although the government relied principally upon the decision in **On Lee v. United States**, 343 U. S. 747, in the Court below (Pet. App. B, p. 31), the government seemingly does not put such stress on that decision now (Pet., p. 4). Respondent submits that this Court has never revitalized the **On Lee** decision and since that decision was based upon the trespass theory, **On Lee** was rightfully rejected by

this Court in **Berger, Lopez** and **Katz** and by the Seventh Circuit Court of Appeals in this case.

Another good reason why this Court should not retroactively validate the government agent's surreptitious eavesdropping is that it was done in contravention of Illinois State law. **People v. Kurth,** 34 Ill. 2d 387, 216 N. E. 2d 154. Thus, the agent's conduct was "manifestly improper" within the meaning of **Lopez v. United States,** 373 U. S. 427, 440. This Court should not condone anyone's intentional violation of law. **Elkins v. United States,** 364 U. S. 206; **Rios v. United States,** 364 U. S. 253. As stated in Justice Homes' dissent in **Olmstead v. United States,** 277 U. S. 438, 485, "if the government becomes a law breaker, it breeds contempt for law . . ."

3. **Lack of jurisdiction to review en banc decision of Court of Appeals.**

Respondent respectfully suggests that there is serious doubt whether this Court has jurisdiction to review the judgment rendered on January 7, 1969 by the Court of Appeals, sitting *en banc.* As contended by respondent in his reply brief filed in opposition to the Government's petition for rehearing *en banc,* respondent here urges that the opinion of the panel of the Court of Appeals rendered on March 18, 1968 was final for the reason that no authority existed at that time for the granting of a petition for rehearing *en banc* under the circumstances of this case and that to afford the government a right of review was contrary to the spirit of the Fifth Amendment's prohibition against double jeopardy.

The right of appeal is statutory and that of the government in a criminal proceeding is limited to the circumstances provided in Title 18, United States Code, Section 3731. Additionally, appeals by the government in criminal cases are something unusual, exceptional and not favored.

**Carroll v. United States,** 354 U. S. 394, 399-400. If the District Court had ruled initially as the Court of Appeals' opinion of March 18, 1968 said it should have ruled (sustain the motion to strike the evidence), it is clear that the government would not have been entitled to appellate review of such ruling at the time of said ruling. **Carroll v. United States,** 354 U. S. 394. The opinion of the panel of the Court of Appeals is entitled to the same degree of finality as is afforded a ruling of the District Court. This is so whether the right to review is limited by the Fifth Amendment or by the statutory restriction on the Government's appeals in criminal causes.[4]

The prejudice here to this respondent is clear for the reason that the judgment of the Court of Appeals sitting *en banc* remanded the case to the District Court for new trial, whereas, the orginal opinion and judgment of the **panel** of the Court of Appeals reversed the conviction without remanding the case for new trial (Pet. App. A, p. 15). Respondent submits that the original judgment of reversal was proper for the reason that this Court, in an almost identical situation reversed the judgment of conviction without remanding the case. **Katz v. United States,** 398 U. S. at 359.

We submit that this Court previously had jurisdiction to review the earlier judgment of reversal rendered by the panel of the Court of Appeals, but the government chose not to file a timely petition for certiorari in this Court to review that judgment. Since the filing of a petition for certiorari is jurisdictional and because the Court of Appeals did not have jurisdiction to grant the petition for rehearing *en banc* in the first place, this Court should not review the latter judgment entered by the Court of Appeals sitting *en banc.*

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[4] In March 1968, the rules of the Seventh Circuit Court of Appeals provided for "rehearings," but did not provide for rehearings *en banc.* See Rule 25, Seventh Circuit Court of Appeals.

## CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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